Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1028 OF 2003
RAUS SHARIF, HASAN LAH AND VINCENT NG JJCA
23 DECEMBER 2007

Banking — Securities for advances — Guarantee — Letter of demand — Whether letter of demand valid — When cause of action arose — Whether time barred

Civil Procedure — Estoppel — First suit withdrawn — Whether estopped from filing second suit — Identification document — Whether could be relied upon as exhibit

The appellant, together with two other individuals, stood as guarantors for a loan granted by the respondent to Pembinaan Damo Sdn Bhd ('principal borrower'). The principal borrower defaulted on the loan. On 23 December 1980, the respondent issued a notice of demand against the principal borrower and all the guarantors. The respondent subsequently on 13 March 1981 filed a suit to recover the loan against the principal borrower and all the guarantors including the appellant. Summary judgment was obtained against the principal borrower as well as two other guarantors. However, the suit was withdrawn against the appellant with the leave of court on 7 November 1991. On 4 May 1992, the respondent issued a fresh notice of demand against the appellant and about a month later, another notice of demand was sent to the appellant on 8 June 1992. The respondent filed a fresh action against the appellant on 23 November 1992 and after a full hearing, the trial judge gave judgment in favour of the respondent. The appellant appealed to Court of Appeal.

Held, allowing the appeal with costs:

(1) The liability of the appellant, and correspondingly the respondent's cause of action arose from the first notice of demand dated 23 December 1980, which launched the first suit against the principal borrower and the guarantors including the appellant, on 11 March 1981. In any event, if the cause of action did not accrue on

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23 December 1980, then it certainly did on 11 March 1981. Since the second suit was only filed on 23 November 1992, it would be barred by limitation (see para 17).

(2) The respondent itself had applied to delete the words 'struck off with liberty' which was a clear representation by the respondent that there would be closure of the matter. Thus, the doctrine of estoppel as expounded in *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank* [1995] 3 MLJ 331 is applicable in this case and the respondent ought to be estopped from filling the second suit (see para 21).

(3) The second letter of demand could not be construed as a valid notice of demand. This was because it failed to identify any guarantee or guarantor but instead wrongly stated that the appellant was 'availed loan facilities at your request by our client and that you had not adjusted or repaid the outstanding together with arrears inclusive of interest in the sum of RM3,375,354.98' (see para 22).

(4) The third letter of demand could not be considered at all because it was not tendered in court by any witness of the respondent. It was only an identification document (ID) in the non-agreed bundle and was never converted to a court exhibit (see para 23).

[Bahasa Malaysia summary

Perayu bersama dengan dua lagi individu, selaku penjamin untuk pinjaman yang diluluskan oleh responden kepada Pembinaan Damo Sdn Bhd ('peminjam prinsipal'). Peminjam prinsipal telah ingkar dalam pinjaman tersebut. Pada 23 Disember 1980, responden mengeluarkan satu notis tuntutan terhadap peminjam prinsipal dan semua penjamin. Responden kemudiannya pada 13 Mac 1981 memfail tindakan guaman untuk mendapatkan semula pinjaman terhadap peminjam prinsipal termasuk dua lagi penjamin. Namun begitu, tindakan guaman itu telah ditarikbalik terhadap perayu dengan kebenaran mahkamah pada 7 November 1991. Pada 4 Mei 1992, responden mengeluarkan satu notis tuntutan baru terhadap perayu dan lebih kurang sebulan kemudian, satu lagi notis tuntutan dihantar kepada perayu pada 8 Jun 1992. Responden memfailkan permohonan baru menentang perayu pada 23 November 1992 dan setelah perbicaraan selesai, hakim perbicaraan memberi penghakiman memihak kepada responden. Perayu membuat rayuan ke Mahkamah Rayuan:

Diputuskan, membenarkan rayuan dengan kos:

(1) Tanggungjawab perayu dan seterusnya kausa tindakan responden

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berbangkit dari notis tuntutan pertama bertarikh 23 Disember 1980, yang telah mencetuskan guaman pertama terhadap peminjam prinsipal dan penjamin termasuk perayu, pada 11 Mac 1981. Dalam apa-apa keadaan, jika kausa tindakan tidak terakru pada 23 Disember 1980, ia telah jelas terakru pada 11 Mac 1981. Memandangkan guaman kedua hanya difailkan pada 23 November 1992, ia telah dihalang oleh had masa (lihat perenggan 17).

(2) Responden sendiri telah memohon untuk menghapuskan perkataan 'menggugurkan dengan sewenangnya' yang merupakan pernyataan oleh responden bahawa akan ada penutupan berkenaan hal itu. Maka doktrin estopel seperti termaktub di dalam kes *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank* [1995] 3 MLJ 331 adalah digunapakai dalam kes ini dan responden harus dihalang daripada memfailkan guaman kedua (lihat perenggan 21).

(3) Surat tuntutan kedua tidak boleh dianggap sebagai satu notis tuntutan yang sah. Ini adalah kerana ia gagal untuk mengenalpasti sebarang jaminan atau penjamin tetapi sebaliknya dengan salah menyatakan perayu telah 'availed loan facilities at your request by our client and that you had not adjusted or repaid the outstanding together with arrears inclusive of interest in the sum of RM3,375,354.98' (lihat perenggan 22).

(4) Surat tuntutan ketiga tidak boleh diambilkira langsung kerana ia tidak diserahkan di mahkamah oleh mana-mana saksi responden. Ia hanya dokumen pengenalan (ID) dalam ikatan tidak dipersetujui dan tidak pernah diubah menjadi ekshibit mahkamah (lihat perenggan 23).]

Notes

For cases on estoppel, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2598–2649.

For cases on guarantee, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2139–2184.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank [1995] 3 MLJ 331 (folld)

Ng Hee Thong & Anor v Public Bank Bhd [2000] 2 MLJ 29 (refd)

Nik Che Kih @ Nik Soo Koh v Public Bank [2001] 2 AMR 1620 (refd)

Soo Hong & Leong Kew Moi v UMBC [1997] 1 MLJ 690 (refd)

Legislation referred to

Bankers' Books (Evidence) Act 1949 ss 4, 5

Limitation Act 1953 s 6(1)

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Appeal from: Suit No D5(D7)(D9)(D4)–22–1534 of 1992 (High Court, Kuala Lumpur)

Ramdas Tikamdas (Siva Ram & Associates) for the appellants.
Arunachalam Ramiah (Arun & Co) for the first respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court at Kuala Lumpur dated 30 October 2003. The High Court had allowed the plaintiff's claim ('the respondent') against the defendant ('appellant') whereby the appellant was ordered to pay the respondent the sum of RM3,375,354.98 with interest at the rate of 11% per annum from 1 May 1992 till full settlement and costs.

[2] On 22 October 2007, we heard and allowed the appeal with costs. We now give our reasons. But first the facts.

FACTS

[3] The respondent is a bank. By a letter of offer dated 12 January 1978, the respondent availed loan facilities to Pembinaan Damo Sdn Bhd ('the principal borrower'). The appellant together with two others, Subhas Damodaran and Prakash Damodaran stood as guarantors. On 16 February 1979 two letters of guarantee were signed jointly and severally by the three guarantors for a total loan sum of RM868,000 availed by the respondent to the principal borrower.

[4] The principal borrower defaulted on the loan. On 23 December 1980 the respondent issued a notice of demand against the principal borrower and all the guarantors ('first notice of demand'). Pursuant thereto, on 13 March 1981 the respondent filed Civil Suit No C242 of 1981 ('the first suit') against the principal borrower and all the guarantors, to recover the loan. The appellant herein was the fourth defendant in the first suit.

[5] On 15 October 1981, the respondent obtained summary judgment against Subhas Damodaran and Prakash Damodaran, and on 25 May 1985, against the principal borrower. Thereafter, upon the lapse of about ten years since the filing of the first suit, the appellant on 30 March 1991 filed an application (encl 123) to strike out the respondent's first suit against him for want of prosecution.

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[6] In response to encl 123, the respondent on 4 June 1991, filed an application (encl 126) for the first suit to 'be struck off with liberty, being an action prematurely commenced without a proper or valid notice of demand on the defendant'.

[7] On 7 November 1991, at the hearing of encl 123 and encl 126 before the learned senior assistant registrar, the respondent applied to amend encl 126 to delete the words 'struck off with liberty'. The amendment was allowed and order in terms was granted in respect of encl 126. The order dated 7 November 1991 reads as follows:

> Upon the application of the plaintiff AND UPON READING the summons in chambers dated 14th day of June 1991 and the affidavit of Nadarajan s/o Govindasamy affirmed on the 13 day of June 1991 and filed herein AND UPON HEARING Mr K Maniam of Counsel for the plaintiff and Miss Regine of Counsel for the defendant IT IS ORDERED that the action against the fourth defendant be and is hereby with leave withdrawn and struck off as being an action prematurely commenced without a proper or valid notice of demand made on the defendant AND IT IS FURTHER ORDERED that the plaintiff do pay the fourth defendant costs as may be taxed.

With the above order, the appellant withdrew his encl 123.

[8] Thereafter, on 4 May 1992, about 11 years after the first suit and judgment against the two guarantors, and seven years after the judgment against the principal borrower, the respondent issued another notice of demand against the appellant for the sum of RM3,375,354.98 with interest thereon (second notice of demand). The second notice of demand, inter alia, stated:

> We are instructed that you were availed loan facilities at your request by our clients and that you had not adjusted or repaid the outstanding together with arrears inclusive of interest in the sum of RM3,375,354.98.

[9] On 8 June 1992, the respondent issued another notice of demand ('third notice of demand') against the appellant, inter alia, stating:

> you had executed a guarantee indemnity in favour of our client for loan facilities granted to the above named party. The above party, we are instructed had failed and or ignored or refused to settle the facilities which stands at RM3,375,354.98 inclusive of arrears and interest.

[10] On 23 November 1992, the respondent filed a fresh action against the appellant in Suit D4–22–1534 of 1992 ('second suit'). Upon a full hearing,

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the learned High Court judge gave judgment in favour of the respondent against the appellant with costs.

ISSUES

[11] Before us, the following issues were raised by the appellant:

(i) Whether, considering that more than six years had lapsed since the respondent had issued to the appellant the first notice of demand, commenced the first suit, and obtained judgment against the co-guarantors and principal borrower, the second suit against the appellant was time barred pursuant to s 6(1) of the Limitation Act 1953.

(ii) Whether considering that the respondent's response to the appellant's application to strike out the respondent's first suit for want of prosecution was to file an application to strike out the first suit 'with liberty' and thereupon at the hearing before the senior assistant registrar of both applications, respondent applied to delete the words 'with liberty' from their application in encl 126, and thereupon withdrew encl 123, there was in the circumstances in fact, law and equity a representation of closure and the respondent is precluded by issue estoppel from filling the second suit.

(iii) Whether in any event,

(a) the second notice of demand by the respondent against the appellant was a valid notice of demand which could commence a proper cause of action against the appellant considering that it did not refer to any guarantee or make any reference to the appellant as a guarantor nor did it refer to any default by the principal borrower; and

(b) if the second notice of demand is construed as a demand under the 'principal debtor clause' in the guarantee, the same is barred under s 6(1) of the Limitation Act 1953 as the cause of action against the principal borrower had commenced vide the first letter of demand and/or the first suit and in fact more than six years had lapsed since judgment was entered against the principal borrower.

(iv) Whether another notice of demand dated 10 June 1992 ('the third notice of demand') which was never tendered in court as a court exhibit and never pleaded and was only an ID can properly be considered by the court as constituting a proper and valid notice of demand to commence a cause of action against the appellant.

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(v) Whether the respondent had proved their claim for RM3,375,354.98 with interest thereon at 11% per annum from 1 May 1992 till date of settlement with costs.

(i) Issue of limitation

[12] It was submitted by learned counsel for the appellant that the second suit filed by the respondent is time barred by virtue of s 6(1) of the Limitation Act 1953 which provides that actions founded on a contract or agreement shall not be brought after the expiration of six years from the date which the cause of action occurred. Learned counsel pointed out that the cause of action against the appellant occurred either from the first notice of demand dated 23 March 1980 or when the first suit was filed on 11 March 1982. Since the second suit was only filed on 23 November 1992, more than 11 years later, it would be barred by limitation.

[13] Learned counsel for the respondent submitted that time only begins to run from the date of demand made against the appellant. The demand was sent to the appellant on 4 May 1992 and 10 June 1992. Hence, the second suit which was filed on 29 August 1992 was not time barred. Learned counsel further submitted that the first suit cannot constitute a sufficient notice of demand because the appellant resisted the claim under the first suit claiming that there was no demand made against him and the action was withdrawn.

[14] The learned High Court judge agreed with the respondent. With utmost respect we disagree. Such a finding by the learned High Court judge would be in contradiction to his own finding on cl 14 of the guarantee relating to the 'principal debtor clause' when he held that:

> It is now settled that the presence of such a clause in the guarantee obviates the necessity for a creditor to make a demand to a guarantor as the guarantee is no longer a collateral agreement and the issuance of the writ is a demand in itself (see *Perwira Habib Bank Malaysia Bhd v Floorwall Furnishing Sdn Bhd & Ors* — Civil Suit No C23–2092 of 1986 Kuala Lumpur High Court). In that case the court ruled that the fact that the defendant had been served with only a carbon copy of the notice was immaterial to establish his liability under the guarantee by virtue of the presence of cl 14 — relating to 'principal debtor clause' in the guarantee itself. The same ruling was made by the same judge (Her Ladyship Siti Norma Yaakob J) in *Credit Corporation (M) Bhd v Choi Seng & Anor*, Civil Suit No C2–22–5650 of 1986 Kuala Lumpur High Court, and *Arab Malaysian Finance Bhd v Kemajuan Mugiland Sdn Bhd & Ors*, Civil Suit No C3236 of 1985, Kuala Lumpur High Court.
>
> In the first place, based on the above authorities, the court is convinced that the plaintiff need not send any notice of demand to the defendant in the present case by virtue of the presence of cl 14 — relating to 'principal debtor clause' in the guarantees. Service of the writ and statement of claim itself on the defendant

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(as guarantor) is sufficient notice of such a demand having been made. However, in the present case, the plaintiff has sent the notice of demand dated 4 May 1992 second case identifying the defendant as the 'principal debtor pursuant to the guarantees. This is a perfectly valid notice and the suit commenced against the defendant based on this notice is also actionable in law.

[15] We are of the view that based on the above principle of law, rightly accepted by the learned High Court judge, it would accordingly follow that the respondent's cause of action against the appellant had occurred on the date when the first suit was commenced against the appellant, ie on 11 March 1981. Since the second suit was filed more than 11 years later, the same was clearly time barred pursuant to s 6(1) of the Limitation Act 1953. Further, even if the guarantees are to be considered as 'on demand guarantees', it must be pointed out that in this case the respondent had launched the first suit against the principal borrower and all the three guarantors, the appellant included, on the basis of the first notice of demand dated 23 December 1980. Based on this cause of action, final judgment had been entered against the principal borrower and two of the guarantors. In the circumstances it would be untenable for the respondent to suggest that for the appellant alone, the cause of action did not accrue with the first notice of demand but was held in abeyance or postponed for about 11½ years until it issued the second notice of demand on 4 May 1992.

[16] In *Nik Che Kih @ Nik Soo Koh v Public Bank* [2001] 2 AMR 1620, the Court of Appeal affirmed the principle that for the purpose of limitation, time began to run from the earliest date on which the creditor could have brought an action. In that case the bank issued a total of three demands:

The first demand was made on 2 April 1986. Arising out of the first demand, the respondent sued the principal debtor ie Nik Seng Development Sdn Bhd. Strangely enough none of the guarantors were included in that suit. Then on 15 May 1986, the respondent issued a second demand against the principal debtor and the appellant and the two other guarantors. Some six years later the respondent withdrew the suit against the appellant and the two other guarantors without assigning any reasons for the withdrawal. On 20 July 1993 the respondent issued a third demand and consequently filed this present suit against the appellant on 21 June 1996 ie about three years later. The issue before the court is when did the time begin to run for the purpose of s 6(1)(a) of the Limitation Act 1953.

[17] The Court of Appeal held that the liability of the principal debtor as well as that of the guarantor arose from the first notice of demand dated 2 April 1986. Similarly, in the present case, it is our judgment that liability of the appellant, and correspondingly the respondent's cause of action arose from the first notice of demand dated 23 December 1980, which launched the first suit against the principal borrower and the guarantors including the

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appellant, on 11 March 1981. In any event, if the cause of action did not accrue on 23 December 1980, then it certainly did on 11 March 1981. Since the second suit was only filed on 23 November 1992, it would be barred by limitation.

(ii) Issue of estoppel

[18] It is the contention of the appellant that the respondent is estopped from bringing the second suit as the first suit was withdrawn by the respondent. The learned High Court judge however disagrees. He held that the withdrawing of the first suit did not absolve the respondent's claim against the appellant as the first suit was withdrawn with the leave of the court. The respondent therefore is not estopped from filing the second suit.

[19] With respect, we are of the view that the issue of estoppel must be decided on the facts that unfold. It is clear from the facts as narrated earlier that the appellant withdrew encl 123 because of the deletion of the words 'struck off with liberty' in the respondent's encl 126. In the circumstances, to allow the respondent to file a fresh action based on the same or substantively the same facts would be unjust and grossly prejudicial to the appellant.

[20] In fact, the same was held in *Ng Hee Thong & Anor v Public Bank Bhd* [2000] 2 MLJ 29. In that case, two guarantors were sued by the bank for a loan advanced to the principal borrower. The bank's application for summary judgment against the guarantors was allowed by the High Court. The guarantors then appealed to the Court of Appeal which allowed the appeal and directed the suit to be tried. At the High Court the bank instead, filed an application for leave to withdraw its claim against the guarantors with liberty to file a subsequent action against the guarantors based on the same cause of action. The reason for wanting to discontinue their claim was the notices of demand against the guarantors were not sent to their proper addresses. The High Court allowed the bank's application. The guarantors appealed to the Court of Appeal which allowed the appeal and set aside the order of the High Court. The Court of Appeal gave leave to the bank to discontinue upon the term that no fresh action should be brought on the same cause of action based on the same or substantially the same factual situation.

[21] In the present case, the appellant is on a stronger ground. The respondent itself had applied to delete the words 'struck off with liberty' which is a clear representation by the respondent that there would be closure of the matter. Thus, we are in agreement with the appellant that the doctrine of estoppel as expounded in *Boustead Trading (1985) Sdn Bhd v Arab*

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Malaysia Merchant Bank [1995] 3 MLJ 331 is applicable in this case and the respondent ought to be estopped from filling the second suit.

(iii) Second letter of demand

[22] We are also of the view that even if a demand is a necessary precondition to commence an action against the appellant, the second letter of demand cannot be construed as a valid notice of demand. This is because it failed to identify any guarantee or guarantor but instead wrongly stated that the appellant was 'availed loan facilities at your request by our client and that you had not adjusted or repaid the outstanding together with arrears inclusive of interest in the sum of RM3,375,354.98'. It is our judgment that the second letter of demand cannot be construed as valid demand as envisaged by the guarantee documents. Even the learned High Court judge, appears to have doubt, as to the validity of the second notice of demand since he had to resort to the third notice of demand.

(iv) Third notice of demand

[23] The learned High Court judge was of the view that the second notice of demand is not necessary in view of the presence of cl 14 relating to principal debtor clause in the guarantees. However, in discussing the second notice of demand, he made reference to the third notice of demand. He said 'in any event the plaintiff has also send the notice of demand to the defendant (as a guarantor) on 10 June 1992'. We are of the view that the third letter of demand cannot be considered at all because it was not tendered in count by any witness of the respondent. It was only an identification document ('ID') in the non-agreed bundle and was never converted to a court exhibit. In *Soo Hong & Leong Kew Moi v UMBC* [1997] 1 MLJ 690 the Court of Appeal held (at p 695):

> During the course of the trial, various documentary exhibits were referred to by both sides and marked as exhibits to be identified (ID) since the admissibility of such documents were objected to by either side on the ground that the makers were not called. I rule that since these documents were not strictly proved as required by s 73(a) of the Evidence Act 1950 thereby deprives the opportunity to test the authenticity of their contents, such exhibits remain inadmissible.

Similarly in this case, the third letter of demand is an ID and had never been converted to a court exhibit. It cannot be relied upon as an exhibit.

(v) Whether the respondent had proved their claim

[24] In this case the loan guaranteed was for RM868,000. But in the second letter of demand and the second suit, the respondent claimed

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RM3,375,354.98. The amount is in serious dispute. However, the learned High Court judge concluded that the respondent had successfully proven its case against the appellant. Learned counsel for the respondent invited us not to disturb the finding of the learned High Court judge as the finding is fact driven. We declined the invitation. No doubt the finding of the learned High Court judge is fact driven, but the calculation as to how the amount of RM3,375,354.98 was arrived at had not been clearly stated in particular, the amount of overdue interest or computation of the interest. In fact the main witness for the respondent, PW1 in cross-examination admitted:

(a) the computation and interest charges had commenced before September 1977 up to January 1978 although the facility (the subject of the guarantee) was released only on 6 February 1978;

(b) before the facility was released on 6 February 1978 there was already a debit in the account of RM334,085.91;

(c) the total interest computed from September 1977 up to June 1992 was RM2,768,905.65;

(d) the interest throughout was computed on a compound basis;

(e) ledger for a period of three years from 28 December 1979 to 31 December 1982 was not produced;

(f) the sum of RM22,750 was debited ostensibly for disbursement and professional fees for the respondent's solicitors.

[25] The learned High Court judge was aware of the above. However, he relied on the summary account in ID3-F by virtue of ss 4 and 5 of the Bankers' Books (Evidence) Act 1949. However, ID3-F was never converted as a court exhibit, and the maker of D3F is unknown. Neither PW1 and PW2 had explained the missing ledgers for the two years and neither witness testified that they had mounted a search for these missing ledgers. PW2 testified that he did not go to the correctness of those documents. He did not examine any copy of the documents with the original entry in the bankers book and the same is correct. Thus, he was unable to answer as to the missing ledgers between 28 December 1979 to 31 December 1982.

[26] In the circumstances, we are not in agreement with the learned trial High Court judge's finding that the respondent had successfully proven its case. It is our judgment that such a finding is clearly a finding not supported by evidence.

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[27] For the reasons aforesaid, we allowed the appeal with costs here and below. Deposit for this appeal to account of taxed costs.

Appeal allowed with costs.

Reported by Brendan Navin Siva